95-1215

Supreme Court, U.S.
FILED
DEC 11 1995
CLERK

No. _____

_____

In The

Supreme Court Of The United States

October Term, 1995

MIN - JU CHANG,

Petitioner

vs.

THE SECRETARY OF TRANSPORTATION,

Respondent

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Min - Ju Chang, pro se
2 Pawn Court,
Egg Harbor Twp. NJ, 08234
(609)485-5112 or 646-9452
(Home)

51

QUESTION(S) PRESENTED

The questions to be presented concern the calculation of time for the 90 days of the statute of limitations under 42 U.S.C. §2000e-16(c) amended 1991, which prescribes 90 days statute of limitations for a federal employee to file complainant at a district court for discriminatory cause after having received the right to sue letter from the agency. If such a complaint was timely filed, but was dismissed without prejudice after the district court's granting of the defendant's motion to dismiss on ground that improper way to serve the Process within 120 days prescribed by Rule 4(j) of the Federal Rule Of Civil Procedure, (Fed. R. Civ. P.). Under each of the circumstance raised in the following questions, what is the accepted way to run the 90 days limitation for a new suit on the same complaint to be commenced at a district court :

Question 1. In accordance with Rule 12.I of the General Rules for the Federal District Court of New Jersey, (Gen. R. Dist. C. NJ), it is 10 days set for a party to file a motion for reargument (or called reconsideration) after the entry of a reversed order by a district court. If such a motion was filed timely, should this number of days, which is less than ten days, be tolled from the 90 days limitation?

Question 2. In accordance with Rule 4, Federal Rule Of Appellate Procedure, (Fed. R. App. P.), it is 30 days set for a party to file notice of appeal to the appellate court after the entry of a reversed order by a district court. If such a notice of appeal was filed timely, should this number of days, which is less than 30 days, be tolled from the 90 days limitation?

Question 3. Pursuant to Rule 60 (b) (1), and (3), Fed. R. Civ. P., a motion to reopen a case, on ground of defendant's extrinsic fraud, was filed 13 days after district court's final order to dismiss, should this 13 days be tolled from the 90 days limitation?

LIST OF PARTIES

Petitioner: Min-Ju Chang, pro se.

Respondent / Defendant:

The Secretary of Transportation,
Represented by U.S. District Attorney of
New Jersey, through the Assistant U.S. Attorney
Paul Blaine.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2-6

STATEMENT OF THE CASE 7-14

REASON FOR GRANTING THE WRIT 15-20

CONCLUSION 20

INDEX TO APPENDICES

APPENDIX A Court order for case 95-5485 on 09/21/95, Third Circuit, granting defendant's motion to affirm District Court's Order for case (cv)94-4009 (JBS).

APPENDIX B District Court Order and Opinion on 06/30/95, Denying Reconsideration on case dismissal for (cv) 94-4009 (JBS).

APPENSIX C District Court Order and Opinion on 11/03/94, Granting Defendant's motion to dismiss (cv)94-4009 (JBS).

APPENDIX D District Court Order and Memorandum, 11/16/93, to dismiss (cv)93-192 (JBS) Without Prejudice.

TABLE OF CONTENTS - continued

APPENDIX E 42 U.S.C. §2000e-16(a),(c),(e)
Employment In The Federal Government.

28 U.S.C. §2071 Rule Making Power Generally.

28 U.S.C. §2072 Rule Of Procedure and Evidence.

Rule 60, Fed. R. Civ. P.
Relief From Judgement Or Order.

TABLE OF AUTHORITIES CITED

PAGE

CASES:

* Tolling Of Statute Of Limitations

Del Raine v. Carlson,
C.A.7 (Ill.) 1987, 826 F.2d 698 18

Pacester Systems, Inc. v. Medtronic, Inc.,
C.A.Cal.1982, 678 F.2d 93. 19

U.S. v. Jack Cozza, Inc.,
D.C.N.Y., 1985, 106 F.R.D. 264. 12

Guilday v. Department of Justice,
D.C. Del., 1978, 451, F.Supp. 717. 12

* New Suit Over Complaint After Dismissal Without Prejudice

Winter Garden Land Co. v. Zavalla-Dimmit Counties Water Improvement Dist. No1, Tex.5 S.W.2d 606,609: 17

Barlow v. Hoffman, 86 P.2d 239,241,103 Colo. 286, 120 A.L.R. 552. 17

STATUTE AND RULES: (cited or mentioned)

42 U.S.C. §2000e-2(a)(1) Employer Practice 2, 7

TABLE OF AUTHORITIES CITED - continued

PAGE

42 U.S.C. §2000e-16(c), (e)
Employment by Federal Government ..... i, 3, 11, 17

Rule 3, Fed. R. Civ. P. Commencement OF Action 3, 12

Rule 4 (d) (4) & (5), Fed. R. Civ. P. 4, 5, 10

Rule 4(j), Fed. R. Civ. P. ..... i, 5, 8, 9

Rule 60 (b) (3), Fed. R. Civ. P.
Relief From Judgement Or Order ..... i, 5, 16

28 U.S.C. §2071. Rule-making power generally 3

28 U.S.C. §2072. Rules of procedure and evidence; power to
prescribe 3, 15, 18

Rule 12.I, Gen. R. Dist. C. NJ ..... i, 5, 18

Rule 4. Fed. R. App. P. 6, 18

Rule 10 (a) Rule Of Supreme Court, (R. S.C.) 6, 15

IN THE
SUPREME COURT OF THE UNITED STATE
OCTOBER TERM, 1995

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the

ORDER and OPINIONs BELOW:

The Order of the United States Court of Appeals of the Third Circuit (Appendix A), which affirmed the district court's Order of June 30, 1995 with Opinion attached (Appendix B), to dismiss petitioner's Civil Rights violation cmplaint at a working place in a Federal Agency. Also relevant were the opinions of the United States District Court filed November 3, 1994 (Appendix C), and November 16, 1993 (appendix D) respectively. None of these opinions had been published.

JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), to review the decision of the United States Court of Appeals of the Third Circuit, filed September 21, 1995. No petition for rehearing had been timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

The verbatim quoted in the following were available at the time of proceedings:

* For Employment by Federal Government, Under Title VII Civil Right Act Of 1964, amended

42 U.S.C. §2000e-2(a) Employer Practice

"It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. §2000-16(c) Regarding to 90 days statute of limitations (App.E, pg. 1)

42 U.S.C. §2000e-16(e), under Chapter 21, subchapter VI

" (e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the constitution and statues...." (App.E)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED - continued

* Power Of Rule Making and Relevant Rules:

28 U.S.C. §2071. Rule-making power generally

> "(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of business..."(App. E)

28 U.S.C. §2072. Rules of procedure and evidence; power to prescribe

> "(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure... in the United States district courts and courts of appeals. (b) such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

Rule 3. Federal Rule Civil Procedure, (Fed. R. Civ. P.) Commencement of Action:

> "A civil action is commenced by filing a complaint with the court."

Rule 4(d) (4) & (5), Fed. R. Civ. P., Service Of Process

> "(d) summon and Complaint: Person to be Served: The summon and complaint shall be served together. The Plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
>
> ...

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED - continued

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summon and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the court and by sending a copy of the summons and of the complaint by registered or certified mail to the attorney General of the United States at Washington District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED - continued

Rule 4(j), Fed. R. civ. P. Dismissal Without Prejudice

> "If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule."

Rule 60.(b)(3) Fed. R. Civ. P.
Relief From Judgement or Order

> "On motion and upon such term as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding .... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party..." (App. E)

Rule 12.I, Gen. R. Dist. C. NJ:

> " Motion for Reargument. A motion for reargument shall be served and filed within 10 days after the filing of the Court's order or judgment on the original motion. There shall be served with the notice a brief setting forth concisely the matters or controlling decisions which counsel believe the Court has overlooked. No oral argument shall be heard unless

CONSTITUTIONAL AND STATUTORY PROVISIONS
INVOKED - continued

the Court grants the motion and specifically directs that the matter shall be reargued orally."

Rule 4, Fed. R. App. P.: Appeal as of right - when taken

"(a) Appeal in civil cases. (1) in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals, the notice of appeal required... shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is aparty, the notice of appeal may be filed by any party within 60 days after such entry."

* Jurisdiction On Writ Of Certiorari
Rule 10. Consideration Governing Review On Certiorari

" Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;" ...

STATEMENT OF THE CASE

FOREWORDS This petition for writ of certiorari is to the order of case 95-5485 (3rd cir.) of the Court Of The Third Circuit entered on September 21, 1995, which affirmed the decision of the Federal District Court at Camden, New Jersey. Court opinions were not issued by the Third Circuit, but was by the District Court, Which was in Appendix B, (App. B), The rest opinions from other judgements were included in App. C & D. for reference. In the following, the case will be stated in sequence along the three of the four relevant dockets styled as Chang vs. The Secretary Of Transportation. The Secretary was represented by the Assistant U.S. Attorney, (AUSA), at Camden of New Jersey, Paul Blaine. The U.S. Attorney for New Jersey was attorney Michael Chertoff at the beginning, later was attorney Faith Hochberg.

1. The Initial Complaint At District Court - CASE 93-192.

1.1 Nature Of Action

Commenced on January 13, 1993 at District Court of New Jersey at Camden, this action was a complaint under Title VII Civil Rights Act of 1964, and amended, also under 42 U.S.C. §2000e-2(a)(1) for wrongful demotion on basis of National Origin, in which the plaintiff was demoted from GS-12 mathematician to GS-9 mathematician at the Federal Aviation Administration Technical Center, (FAA Tech. Center), located at the Atlantic City International Airport of New Jersey.

The initial complaint started in March of 1991, but was unable to be settled for around twenty months before the Agency issued its final decision.

1.2 The Case Discoveries Conducted

On May 29, 1993, the defendant, represented by the

AUSA, filed a motion to dismiss with an alternative to have partial summary. During pending for that motion, the defendant, through the AUSA, had initiated an interrogatory discoveries, which was answered by the plaintiff with materials showing how she had been treated wrongfully. From there after, around two sets of written interrogatories had been exchanged between both parties.

1.3 The Orders To Dismiss Without Prejudice

On November 16, 1993, the case was ordered to dismiss without prejudice under then existing Rule 4(j), Fed. R. Civ. P., after District Court's granting of Defendant's motion of May 29, 1993 on ground that improper service of summon and complaint to the U.S. district attorney of New Jersey. Rule 4(j), Fed. R. Civ. P. demands a case dismissal without prejudice in case no good excuse for the complete service of summons and complaint upon a defendant within 120 days.

After that, on January 12, 1994 the plaintiff's timely filed motion for reconsideration for that dismissal was denied.

And on June 29, 1994, the plaintiff's timely filed appeal to the Court Of The Third Circuit was disaffirmed, (case 94-5041) was mandated on July 22, 1994.

Finally, on August 5, 1994, the plaintiff's motion to reopen the case, filed 13 days after the last reversed order, was also denied. (the events were listed in App.B).

1.4 Motions And Appeal Were Filed After The Order To Dismiss Without Prejudice, Why?

The plaintiff could submit a new suit over the same complaint immediately after case 93-192's dismissal without prejudice entered on November 16, 1993. Instead, a motion for reconsideration (reargument), an appeal to the Third Circuit, and a motion to reopen (on ground of extrinsic fraud)

were taken, why? The answer was relied on the insides that caused the plaintiff to take such actions.

According to District Court's memorandum, (App. D, item 6 & item 13), the plaintiff failed to serve the summon and complaint to the U.S.Attorney of New Jersey personally within 120 days prescribed by Rule 4(j), Fed. R. Civ. P. even after being advised by the AUSA that the service of process had not been effected.

But actually, before the filing of defendant's May 29, 1993 motion to dismiss, all the advice from the AUSA to the plaintiff was came by his letter of April 12, 1993 as the following:

"Dear Ms. Chang:

This office has received a copy of the summons and the complaint in your action, which was apparently commenced on or about January 13, 1993, I write to inform you that you have not affected service of process in this matter and that until proper service is made the defendant is under no obligation to respond to the complaint.

Federal Rules of Civil Procedure 4(d)(5) and (4) specify the manner in which service must be made. I have enclosed a copy of Rule 4 for your reference.".

signed by the AUSA.

The plaintiff who was pro se had heard that the reverse party was usually mean in language during a law suit. Besides, from the first complete sentence of the AUSA's letter, and the fact that the summon and complaint sent by the plaintiff to the USDA for

New Jersey at Camden New Jersey had been received there on January 25, 1993 (App.D, item 3 pg. 2), the plaintiff evidenced that the AUSA, who has been the official representative of the U.S. Attorney for New Jersey at Camden District Court, had personally received the summon and complaint sent by her to that office through a registered mail.

Furthermore, attached to the AUSA's letter was the xerox verbatim of Rule 4, fed. R. Civ. P.. In which, the passage concerning service of summon and complaint upon the United States (existing before December, 1993), was a target worth for preponderance. The following was the passage:

> Rule 4(d)(4), Fed. R. Civ. P.:
>
> " Upon the United States, by delivering a copy of the summon and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or... and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, district of Columbia,..."

In this passage, the pro se plaintiff grabbed it explicitly prescribed that to serve process to the Attorney General at Washington D.C., only mail delivery could be accepted, but to the U.S.Attorney of a district, no restriction regarding personal delivery or mail delivery was written, as long as the document could be received by USDA or his legal representative personally, This was probably because an USDA's (or AUSA's) office was collocated with a district court.

Beside that letter, no further information could be obtained from the AUSA, the plaintiff, then, based on the forgoing reasons, sent another copy of summon and complaints to the Director of the FAA Tech. Center, who was Mr. Harvey Safeer, at International Airport, New Jersey, 08405 (App.D item 5, p.3). Though this step was not prescribed by Rule 4, Fed. R. Civ. P..

Later, after knowing the dismissal of case 93-192, the plaintiff worried and believed a new suit would be an uncertainty if she could not keep that current one. Henceforth, following the order to dismiss case, a motion, an appeal, and another motion had been taken.

2. The New Suit On The Same Complaint At District Court, CASE 95-4009.

2.1 Nature Of Action

On August 19, 1994, after District Court's August 8, 1994 denial of plaintiff's motion to reopen for case 93-192, and after reconsidering the impact caused by the unsolved discrimination, the plaintiff filed the second action over the same complaint at the district court.

2.2 The Order To Dismiss

On November 3, 1994, the District Court entered order to dismiss plaintiff's new suit after granting the defendant's motion to dismiss (App.C). In defendant's motion, he argued not to grant equitable tolling of statute of limitations of the 90 days, prescribed under amended 42 U.S.C. §2000e-16(c), by asserting that the plaintiff's unable to complete the service of process to the USDA was unexcusable. He, disregarding the undisclosed merit of complaint to District Court, assumed that the first complaint had never been filed and claimed that plaintiff's new suit was outbound from the 90 days, which expired on February 10, 1993 as he counted day by day from the date, November 12, 1992, the right to sue letter been received by Plaintiff.

Following that, on June 30, 1995, the Plaintiff's timely filed motion for reconsideration was denied. In her motion she asserted that those motions and appeal were made either according to the federal rules or to the general rules of district courts, and that there had been no violation of statute of limitations on her part. In addition, she cited precedent opinions to justify the role of the

statute of limitations under conditions when impact of discrimination continuing, and to claim her right for the new submission of complaint:

> **"In an action created by federal law, the statute of limitations is tolled by the filing of the complaint; the limitation period will remain tolled even if the court finds that plaintiff was dilatory in serving the summons and complaint. "**
> U.S. v. Jack Cozza, Inc., D.C.N.Y. 1985, 106 F.R.D. 264.

> **"In case of continuing violation of this subchapter, plaintiff may file charges or institute action at any time during which alleged violation has taken place, and such charge or action will not be barred by applicable statute of limitations, even though some of acts complained of occurred outside of limitation period."** Guilday v. Department of Justice, D.C. Del., 1978, 451 F.Supp. 717.

Responded to her motion, the District Court had reconsidered, but granted only partial tolling of the 90 days limitation in the way stated under 'Denying Reconsideration' as the following (App. B, pg. 1-2, 2-1, 2-2, & 3):

> " The court finding further that the period of time during which a complaint and appeal upon a cause of action actually pending is excludable from the statute of limitations governing a late suit upon the same cause of action where the prior complaint was, as in the present circumstances, dismissed without prejudice; and conversely, the time during which neither the prior complaint nor reconsideration nor the appeal thereof are actually pending is not excluded from the limitations period; ...", and

> " The court finding that the following

chronology has occurred:

(1) 11/12/92 -- Right-to sue letter received;

(2) 1/13/93 -- Plaintiff's complaint filed in civil No 93-192, 62 days after receipt of right-to-sue letter; 28 days remain in limitations period;

(3) 11/23/93 -- Order entered dismissing Complaint for violation of Rule 4(j);

(4) 11/29/93 -- Motion for reconsideration filed; 6 days elapse and 22 days remain in limitations period;

(5) 1/12/94 -- Order entered denying reconsideration;

(6) 1/24/94 -- Appeal to Third Circuit filed; 12 days elapse and 10 days remain in limitations period;

(7) 6/29/94 -- Judgement affirmance filed;

(8) 7/12/94 -- Motion to reopen docket filed in district court; 13 days elapse, limitation period expired 3 days previously;

(9) 8/8/94 -- Order entered denying motion to reopen;

(10) 8/19/94 -- New complaint filed in civil no. 94-4009(JBS), total 14 days beyond expiration."

Based on that chronology, it was 14 days beyond expiration of

the 90 days limit, while the plaintiff's tolling was either 4 days or 17 days within limit when new suit 94-4009 was filed.

3. Appeal To The Court Of The Third Circuit From The District Court's Dismissal to the new suit, case 94-4009.

On July 6, 1995 the notice of appeal to The Court Of The Third Circuit upon the District Court's decision for case 94-4009 was filed, It was docked on July 25, 1995 with case no 95-5485.

On September 21, 1995, district court's decision was affirmed after the Court Of the Third Circuit granted AUSA's motion for affirmance dated July 28, 1995, And on October 13, 1995, the denial was mandated. No opinion issued by the Third Circuit.

REASON FOR GRANTING THE PETITION

Pursuant to Rule 10 (a) of Rules for the Supreme Court, effected October 2, 1995, the plaintiff prays for the granting of this writ for certiorari because the Court of the Third Circuit, which had affirmed the District Court's order, had entered a decision in conflict with the decision of another United States court of appeals on the same important matter, and had departed from the accepted and usual course of judicial proceedings in deciding the relevant issues.

To support this petition, the plaintiff shall rely on the preponderance of these four issues:

1. What is the accepted and usual course of judicial proceedings? And which procedures were applied in this case?

2. Had The Court Of The Third Circuit departed from the accepted and usual course of judicial proceedings in deciding relevant issues?

3. Had The Court OF The Third Circuit entered a decision in conflicts with the decision of other federal appellate court?

4. If to consider the public interest, is the federal question raised within important? and is the merit of Petitioner's complaint filed at District Court important?

These issues can be answered as the following:

1. What is the accepted and usual course of judicial proceedings? And which procedures were applied in this case?

Under 28 U.S.C. §2072, it was clearly stated that the rules

authorized shall be the gear of the accepted and usual course of judicial proceedings because

> "... All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. §2072(b).

Henceforth, when the District Court entering its first order to dismiss case 93-192 without prejudice on November 16, 1993, faceing to the plaintiff was each of the five alternatives, which was to establish a new suit over the same complaint, to file a motion for reargument, to appeal to the next level higher court, to file a motion to reopen, or to give up her complaint.

Her first choice was to file a motion for reargument in accordance with Rule 12.I, Gen. R. Dist. C. NJ. By the virtue of this rule, the 10 days allowance for a motion plus the pendency period for the motion was tolled from the 90 days limitation prescribed under Statute.

Following to the district court's denial of her motion for reargument, her choice was an appeal to the Court Of The Third Circuit in accordance with Rule 4, Fed. R. App. P.. By the virtute of this rule, the 30 days allowance for notice of appeal and the pendency period for the appeal was tolled from the 90 days limitation prescribed Under statute.

And following to The Third Circuit's reversed decision on her appeal, her choice was a motion to reopen the suit in accordance with Rule 60 (b) (1) & (3), Fed. R. Civ. P., for the reasons described earlier (section 1.4 under 'Statement Of Case'). There was an 13 days eclipse, which could be tolled from the 90 days limitation prescribed under Statute since this action was almost continuous to the last proceeding and the cause of motion was not frivolous.

Finally after the motion to reopen case 93-192 was

denied, her choice was to establish a new suit on the same complaint, Since to continue to seek for relief from her complaint was necessary. Her action was not lack of supportive precedents, which consisted to New Jersey's public policy for affirmative actions against employment discriminations:

> " Dismissal without prejudice is not a dismissal on the merits and does not bar subsequent suit upon the same cause of action." Winter Garden Land Co. v. Zavalla-Dimmit Counties Water Improvement Dist. No1, Tex.5 S.W.2d 606,609:

> " A dismissal without prejudice prevents the dismissal from operating as bar to any new suit which plaintiff might desire to bring on the same cause of action, and such dismissal does not deprive the defendant of any defense he may be entitled to make to the new suit or confer any new right on the plaintiff." Barlow v. Hoffman, 86 P.2d 239,241,103 Colo. 286,120 A.L.R. 552.

Based on the forgoing reasons, even if not to toll the 13 days eclipsed for the motion to reopen from the 90 days statute of limitations, there was still four days within the limitation period when the new suit, case no. 94-4009, was entered on August 19, 1994. Henceforth, her second suit over the same complaint was timely filed. (App.B includes the proceedings in sequence).

2. Had The Court Of The Third Circuit departed from the accepted and usual course of judicial proceedings in deciding relevant issues?

Yes, as listed in the district Court Order of June 30, 1995, (App.B), the number of days granted by Rules for a party's remedy actions of good cause should be tolled from the 90 day limitation prescribed by 42 U.S.C. §2000e-16(c), But it had been done otherwise by both Court of the District and Court of The Third Circuit.

To be specific, after a reversed order had been entered at the district court, a number of days was granted for action of good cause, Which was to the maximum of 10-days on motion for reargument under Rule 12.I, Gen. R. Dist. C. NJ., or to the maximum of 30 days on appeal to a circuit court under Rule 4, Fed. R. App. P.. But this number of days had not been granted by District Court in item (4) and (6) of its order on June 30, 1995 (App. B), Its unable to toll the six days in item (4) and twelve days in item (6) from the 90 days limitation was to deny plaintiff's right before the established judicial system. Especially when there was no way for the plaintiff to decide her next case-proceeding before she could read the content of District Court's opinion attached to the order. According to 28 U.S.C. §2072 (b), which states:

> "...All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

On this matter, The Third Circuit and the District Court had departed the accepted and usual course of the judicial proceedings.

3. Had The Court Of The Third Circuit entered a decision in conflicts with the decision of other federal appellate court?

Yes, as cited by these two precedents from other appellate courts upon tolling statute of limitations:

> " Statute of limitations on claim stops running when suit on claim is commenced, and federal suit icommenced by filing of complaint, not by service of complaint; hence delays in service do not affect running of statute of limitations. Del Raine v. Carlson, C.A.7 (Ill.) 1987, 826 F.2d 698.", And

> " Federal action is commenced by the filing of a complaint, not by service of process, and it is thus the filing of actions in coordinate jurisdictions that invokes considerations of comity.

Pacester systems, Inc. v. Medtronic, Inc., C.A.Cal.1982, 678 F.2d 93."

Henceforth, the tolling of 90 days period should be started on, January 13, 1993, the day when the civil action was commenced at District Court (case no. 93-192), and continued to be tolled until the reversed order from an appeal entered on June 29, 1994 by the Third Circuit. Consequently, the District Court's and the Third Circuit's decision were in conflict with that of other appellate court for their unable to toll those six and twelve days described in item (4) & (6) of the chronology, written by District Court on June 30, 1995 (App.B).

4. If to consider the public interest, is the federal question raised within important? and is the merit of Petitioner's complaint filed at District Court important?

Yes, they are both of national importance to the public's welfare. Because not too many people would take the heat of a law suit even if being positioned on the down side of an inequity if he or she could not afford a good attorney. Those who had to bear the bitterness to proceed a law suit on pro se were usually of no other choice, and had to rely solemnly on Federal Rules, Rules Of Courts, and the Statutes. Very likely, these federal questions raised within are questions of others including those in Law professions. However, to dissolve dispute through a settlement is used to be a heftier way than that of an official appeal or petition, therefore, existing questions remained unsolved. This petitioner's condition had forced her into this digging job that she may have chance to survive from her misfortune, And also by that, the answers of raised questions can benefit to many.

More than that, if this writ can not be granted, the complaint attached to it will have no chance to be revealed, nor will it be for the piece of truth in the Agency. Not only

the petitioner's to be loomed, even the public will be affected as well. Since the Affirmative Action against employment discrimination has been a promised national policy to all citizens. If this petitioner's effort shall be in vain, then the justice system will be in doubt, So will be gone with the faith in our Government. Therefore, the granting of this writ is of national importance.

Based on the forgoing reasons, it is concluded that:

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
/s/ Min-Ju Chang

Date: December 2, 1995
(Type-setting redone on:
January 19, 1996)

Min-Ju Chang, pro se

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 95-5485

MIN-JU CHANG
vs.
SECRETARY OF TRANSPORTATION

(D.N.J. CIV. NO. 94-CV-04009)

Present: SLOVITER, CHIEF JUDGE, SCIRICA AND McKEE, CIRCUIT JUDGES submitted are:

(1) Appellee's motion for summary affirmance;
(2) Appellant's response and cross-motion for summary reversal; and
(3) Appellee's response to cross-motion for summary reversal in the above-captioned case.

Respectfully,

/s/ P. Douglas Sisk
Clerk

PDB/LLB

ORDER

(Filed on September 21, 1995)

The foregoing motion for summary affirmance is granted; the order of the district court is summarily affirmed pursuant to 3rd Circuit. LAR 27.4 and Chapter 10.6 of the Internal Operating Procedures of this court. The cross-motion for summary reversal is denied.

By the Court,
/s/ Sloviter
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MIN-JU CHANG,	:	
Plaintiff,	:	
v.	:	Civil No. 94-4009(JBS)
THE SECRETARY OF TRANSPORTATION,	:	
Defendant.	:	

ORDER DENYING RECONSIDERATION

This matter having come before the court upon motion of plaintiff, Min-Ju Chang, pursuant to General Rule 12I (D.N.J.) for reconsideration of the court's Opinion and Order of November 3, 1994, which had granted defendant's motion to dismiss this action on statute of limitations grounds; and

The court having considered all submissions in support and opposition to this motion; and having again examined the issue of the tolling of the statute of limitations under 42 U.S.C. §2000e-16(c) during the pendency of plaintiff's prior complaint in Civil Action No. 93-192(JBS), which had been timely filed and dismissed without prejudice due to failure to comply with former Rule 4(j), Fed. R. Civ. P., with the dismissal order subsequently affirmed on appeal in App. No. 94-5041 (3rd Cir.);

The court finding, as stated in the Opinion of November 3, 1994, that the 90-day limitations period of 42 U.S.C. §2000e-16(c) is subject to equitable tolling; and

The court finding further that the period of time during which a complaint and appeal upon a cause of action are actually pending is excludable from the statute of limitations governing a late suit upon the same cause of action where the prior complaint was, as in the present circumstances, dismissed without prejudice; and conversely, the time during which neither the prior complaint nor reconsideration nor the appeal thereof are actually pending is not excluded from the limitations period; and

The court finding further that the dismissal of the prior complaint does not preclude refiling of the present case so long as it is timely, because the previous Rule 4(j) dismissal was without prejudice, i.e.,without operating as a final order upon the substance of the claim; and

The court finding that the following chronology has occurred:

(1) 11/12/92 -- Right-to sue letter received;

(2) 1/13/93 -- Plaintiff's complaint filed in civil No 93-192, 62 days after receipt of right-to-sue letter; 28 days remain in limitations period;

(3) 11/23/93 -- Order entered dismissing Complaint for violation of Rule 4(j);

(4) 11/29/93 -- Motion for reconsideration filed; 6 days elapse and 22 days remain in limitations period;

(5) 1-12-94 -- Order entered denying reconsideration;

(6) 1-24-94 -- Appeal to Third Circuit filed; 12 days elapse and 10 days remain in limitations period;

(7) 6-29-94 -- Judgement affirmance filed;

(8) 7/12/94 -- Motion to reopen docket filed in district court; 13 days elapse, limitation period expired 3 days previously;

(9) 8/8/94 -- Order entered denying motion to reopen;

(10) 8/19/94 -- New complaint filed in civil no. 94-4009 (JBS), total 14 days beyond expiration."

The court finding, therefore, upon reconsideration, that the present complaint, filed August 19, 1994, was filed at least 14 days after the expiration of the limitations period of 42 U.S.C. §2000e-16(c), even when all conceivable time intervals from November 12, 1992 have been excluded where no complaint, reconsideration motion, appeal, or motion to reopen was pending; and

Finding, in summary, that plaintiff's complaint herein under Title VII of the Civil Rights Act of 1964 was not timely filed, and that the filing of this Complaint therefore was barred as untimely under the applicable statute of limitations, as previously determined in this court's Opinion and Order filed November 3, 1994;

It is this 30th day of June, 1995 hereby

ORDERED that plaintiff's motion for reconsideration this court's Order of November 3, 1994 be, and it hereby is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MIN-JU CHANG,	:	
Plaintiff,	:	
v.	:	Civil No. 94-4009(JBS)
THE SECRETARY OF TRANSPORTATION,	:	
Defendant.	:	

ORDER
(Filed June, 30, 1995)

This matter having came before the court upon the motion by plaintiff to validate the service of summon(s) and complaint for the captioned matter, and the court having considered the declarations of the party; and the court finding that the issue of service of summons upon defendant in the present case is moot because the complaint was untimely filed, as determined in the Opinion and Order of November 3, 1994, upon which reconsideration was denied on June 30, 1995;

IT IS this 30th day of June, 1995
ORDERED that plaintiff's motion to "validate service of the summons and complaint" is DISMISSED as moot.

/s/ Jerome B. Simandle
JEROME B. SIMANDLE
U. S. DISTRICT JUDGE

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MIN-JU CHANG, Plaintiff,	:	
v.	:	Civil Action No. 94-4009(JBS)
THE SECRETARY OF TRANSPORTATION, Defendant	:	OPINION
	:	(November. 3, 1994)

APPEARANCE:

Ms. Min-Ju Chang, Plaintiff pro se
2 Pawn Court, McKee City, NJ 08232 (new zip-code 08234)

Faith Hochberg, attorney for Defendant
United States Attorney
By: Paul A. Blaine, AUSA
401 Market Street, P.O. Box 1427, Camden, NJ 08101

SIMANDLE, District Judge:

Plaintiff pro se, Min-Ju Chang, brings this action for discrimination on the basis of national origin under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e- 16(c). In essence, plaintiff alleges that she was demoted from a GS-12 to a GS-9 level mathematician in the Federal

Aviation Administration (FAA) for discriminatory reasons. An earlier-filed action, styled Min-Ju Chang v. The secretary of Transportation, et al., No. 93-cv-192 (JBS), alleging the same cause of action, was dismissed by this court without prejudice because plaintiff had failed to comply with the rules regarding service of process in effect at the time. The court found that plaintiff failed, without good cause, to serve the named defendants with process in the manner specified by Fed. R. Civ. P. 4(d)(4) and (5) in a timely manner, namely, within 120 days of filing of the complaint. Fed. R. civ. P. 4(j). See Opinion and Order filed November 16, 1993.[1]

Ms. Chang now brings this second complaint, assigned a new number on the court's docket. The matter is before the court upon the motion of defendant to dismiss plaintiff's complaint on statute of limitations grounds.

DISCUSSION

In the 1991 amendments to Title of the Civil Rights Act of 1964, congress enlarged the relevant statute of limitations to file suit in district court to 90 days from the date the aggrieved party receives notice of final action from the Equal Employment Opportunity Commission (EEOC) or government department. 42 U.S.C. §2000e-16(c).[2] The initial federal action was commenced following plaintiff's receipt on November 12, 1992

---

[1]Plaintiff subsequently brought a motion for reconsideration, which was denied by this court's Order of January 10, 1994. This court's decision to dismiss the complaint without prejudice was affirmed on appeal to the United States Court of Appeals for the Third Circuit on July 22, 1994. Finally, the court denied a subsequently -filed motion by plaintiff for leave to reopen the docket ant to permit service out of time. See Memorandum and Order filed August 5, 1994.

of the department of Transportation's November 5, 1994 letter of final decision dismissing plaintiff's formal administrative complaint of discrimination. See Ex 1 to Def. Br. Plaintiff filed her initial complaint with this court 62 days later, on January 13, 1993. the initial action was thus timely filed. It was dismissed without prejudice, however, because of failure to comply with relevant service of process rules.

The present action, of course, is brought outside of the relevant statutory period. Plaintiff's second complaint was filed on August 19, 1994. The only question is whether the statute may be equitably tolled so as to permit the late filing.

In Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990), the Supreme Court held that equatable tolling principles could be applied to suits brought under the pre-1991 amendments to §2000e-16(c)[3]. In reaching its conclusion,

---

[3] That section provides, in pertinent part:

> within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, or after one hundred and eight days from the filing of the initial charge with the department, agency or unit or with the Equal Employment Opportunity commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

the Court determined that the limitations period was not jurisdictional in nature, and thus could be subject to tolling in a manner not expressly set forth in the statute. Nonetheless, the Court stressed that Title VII litigation against a government agency required a waiver of sovereign immunity, and that, accordingly, available equitable tolling principles must be strictly confined to comport with Congressional intent. Id. at 95-96. In the case before it, the Court held that equitable tolling principles did not ultimately save plaintiff's untimely discrimination claim, because what was before the Court was nothing more than a "garden variety claim of excusable neglect." Id. at 96.

Moreover, the Third Circuit instructs that there are three traditionally recognized situations in which equitable tolling principles might appropriately be applied: (1) if the defendant has actively misled the plaintiff; (2) if the plaintiff has "in some extraordinary way" been prevented from asserting her rights;or (3) if the plaintiff has timely asserted her rights mistakenly in the wrong forum. Miller v. Beneficial Management Group, 977 F.2d 834, 845 (3d Cir. 1992) (citing Kocian v. Getty Ref. & Mktg. Co., 707 F.2d 748, 753 (3d Cir.), cert. denied, 464 U.S. 852 (1983)).

Clearly, none of the three principal recognized justifications for equitable tolling applies to the present case. On the question of whether the plaintiff was "actively misled," as this court articulated in its decision dismissing plaintiff's initial complaint, just the opposite is true. Assistant united states Attorney Paul Blaine actively assisted plaintiff in effectuating proper service upon defendants. Plaintiff was expressly informed by letter dated April 12, 1993, after ineffective service was attempted, that service was improper, and that Fed. R. Civ.. P. 4(d)(4) and (5) governed the method of service to be followed.

---

[3] Prior to amendment, the statute of limitations provided for in §16-e (? §2000e-16(c)) was 30 days from the date of receipt of notice of final agency action.

The letter enclosed a copy of Rule 4. See Opinion filed November 16, 1993 at q 5. As to the other two situations in which equitable tolling has been recognized to be appropriate, there is no assertion here that plaintiff was confused by the actions of another as to the applicable statute of limitations or that , for some reason, she was "prevented" from asserting her rights; nor did plaintiff timely assert her rights in the wrong forum.

The only question is whether plaintiff should be entitled to equitable tolling of the statute solely on the ground that she was proceeding pro se. This court's review of Third Circuit and Supreme Court authority reveals no case in which the statute was tolled solely on such a ground, even in a case of litigation between private parties in which sovereign immunity issues are not implicated.

In Kocian v. Getty Refining & marketing Co., 707 F.2d 748, 755 (3d Cir.), cert. denied, 464 U.S. 852 (1983), the Third Circuit noted that its previous discussions about the appropriate application of equitable tolling principles in cases in which "lay persons unfamiliar with the complexities of the administrative procedures" represent themselves was inapplicable to Kocian's complaint, as plaintiff was represented by counsel. Tracing that statement back to the cited sources, Hart v. J.T. Baker Chemical Corp., 598 F.2d 829 (3d Cir. 1979), and Bronze Shields, Inc. v. New Jersey Department of Civil Service, 667 F.2d 1074, 1085 (3d Cir. 1981). we find that the court did not apply such a rule in either case. Thus, there is no precedent for equitable tolling the statute of limitations solely on the basis that plaintiff proceeded pro se. Plaintiff, moreover, was not confused as to the applicable statute of limitations, but rather found herself against a statute of limitations problems as a consequence of a failure to properly serve, a problem this court has already concluded was not subjct to excuse for good cause because of plaintiff's pro se status, especially in light of the assistance she received on that subject from the United States Attorney's Office. See Opinion filed November 13, 1993

at ¶¶ 8-12. Baldvin County welcome Center v. Brown, 466 U.S. 147 (1984), is instructive. The plaintiff in that Title VII action was pro se and sought to invoke equitable tolling for the period of time after she attempted to initiate a complaint by filing her right-to-sue letter, which time period included time during which she sought appointment of counsel from the court. The Supreme Court rejected plaintiff's argument that she should be spared the harsh application of the statute of limitations based on her assertion that she had used "diligent efforts" to sue on time, in light of the fact that the right to sue letter set forth the applicable limitations period and in light of the fact that both the district court and the magistrate handling plaintiff's application for court-appointed counsel reminded plaintiff of the limitations period before the statute expired. The Court explained: "The simple fact is that Brown was told three times what she must do to preserve her claim, and she did not do it. One who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence." Id. at 151.

Present plaintiff was instructed on the subject of proper service by the United states Attorney's Office, and thus this court concluded that plaintiff's actions in failing to timely effectuate proper service upon defendants in the initial action failed to provide good cause for delay; under such circumstances, it is difficult to conclude that those actions are anything beyond the type of "garden variety claim of excusable neglect" that the Court in Irwin found could not operate to equitable toll the statute of limitations in a action brought under §2000e-16(c). In light of AUSA Blaine's advice, it appears that plaintiff simply failed to diligently act to preserve her right to pursue her claim. Under such circumstances, principles of equitable tolling are not available to save plaintiff's claims. Baldwin County Welcome Center, 466 U.S. at 151. In this case, as in Baldwin, pro se plaintiff was anything but misled; she was warned that she must comply with a particular procedureor or risk forfeiting her right to

sue. No principle of equitable tolling is available to present plaintiff, and the court must dismiss plaintiff's renewed complaint as untimely.

CONCLUSION

for the reasons stated herein, the court will grant defendant's motion to dismiss plaintiff's complaint on statute of limitations grounds. An appropriate Order follows.

Date: November 3, 1994 /s/ Jerome B. Simandle

JEROME B. SIMANDLE
U.S. DDISTRICT JUDGE

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MIN-JU CHANG, Plaintiff,	:	
v.	:	Civil Action No. 94-4009(JBS)
THE SECRETARY OF TRANSPORTATION, Defendant	:	
_____	:	

ORDER
(Filed November 3, 1994)

This matter having come before the court upon the motion of defendant, The Secretary of Transportation, to dismiss plaintiff's complaint on statute of limitations grounds; and the court having considered the submissions of the parties; for the reasons stated in the Opinion of today's date;

It is this 3rd day of November, 1994 hereby

ORDERED that defendant's motion to dismiss is GRANTED; and it is

FURTHER ORDERED that plaintiff's complaint is DISMISSED WITH PREJUDICE.

/s/ Jerome B. Simandle

JEROME B. SIMANDLE
U.S. DISTRICT JUDGE

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MIN-JU CHANG, Plaintiff,	:	
v.	:	Civil Action No. 93-192 (JBS)
THE SECRETARY OF TRANSPORTATION, Defendant	:	MEMORANDUM AND ORDER (Filed November 16, 1993)

SIMANDLE, District Judge:

Presently before the court is defendant's motion to dismiss plaintiff's complaint for failure to timely serve the summons and complaint pursuant to Fed. R. Civ. P. 4(j). Specifically, the defendants contend that plaintiff failed to serve the United States Attorney for the district of New Jersey personally within 120 days as required by Fed. R. Civ. P. 4(d)(4) and 4(j). In the alternative defendant's move for partial summary judgment. Additionally, plaintiff, Min-Ju Chang, makes a cross-motion for summary judgment; and defendants make a second motion for summary judgment. For the reasons stated below, defendant's motion to dismiss is granted; and all other motions are dismissed as moot.

1. The underlying action by plaintiff, Min-Ju Chang ("Ms. Chang"), is brought pursuant to §703 of Title VII,

42 U.S.C. § 2000e-2(a)(1), for wrongful demotion based on national origin. discrimination, against the Secretary of Transportation, and the Federal Aviation Administration Technical Center, Atlantic City International Airport, in Atlantic City, New Jersey. Ms. Chang was hired in 1985 as a GS-12 Mathematician in the Airborne systems Technology Branch of the Federal Aviation Administration, working out of Atlantic City, New Jersey. In April 1992, after approximately two years of on-going performance review and monitoring, plaintiff was demoted in grade to GS-9, for allegedly insufficient and unacceptable job performance.

2. Plaintiff commenced an action before the Merit Systems Protection Board ("MSPB") challenging her demotion on grounds that her work performance was indeed adequate, and that she performed acceptably at the higher level. The MSPB suit was decided adversely to the plaintiff, and the final decision of the MSPB was affirmed without opinion by the Federal Circuit Court of Appeals. Min-Ju Chang v. Department of Trans., No 93-3181 (Fed. Cir. Aug. 13, 1993). In this action challenging her demotion on grounds of discrimination based on national origin, plaintiff seeks to be reinstated at her former grade and to recover damages for allegedly wrongful demotion from GS-12 to GS-9.

3. Plaintiff commenced this action by filing a complaint on January 13, 1993. Thus, plaintiff's 120 day period for service under Fed. R. Civ. P. 4(j) expired on May 13, 1993. After the action was commenced, plaintiff sent copies of the summons and complaint to the United States Attorney's Office in Camden, New Jersey, and to the Attorney General in Washington, D.C., by certified mail, These documents were received there on January 25, 1993, and February 2, 1993.

4. The record indicates that the service on the United States Attorney was not personally delivered, as required by Fed. R.

Civ. P. 4 (d)(4) and (5), and thus service was not properly effective. Mailing the summons and complaint is insufficient. Braxton v. United States, 817 F.2d 238, 241 (3d Cir. 1987)). (citing Whale v. United States, 792 F.2d 951 (9th Cir. 1986).

5. On April 12, 1993, the Secretary's counsel wrote to Ms. Chang to advise her that she had not effected proper service upon the Secretary. Plaintiff was specifically informed that Fed, R. Civ. P. 4 (d) and (5) govern the method of service to be followed, and she was provided with a copy of Rule 4 in its entirety (see Declaration of Paul A. Blaine, filed May 19, 1993, hereinafter "Blaine Declaration"). On April 14, 1993, another copy of the summons and complaint was received at the FAA Technical Center by certified mail.

6. Service upon the United States pursuant to Fed. R. Civ. P. 4(d)(4) is a two step process that requires (1) personal service of the summons and complaint to the United States Attorney for the district in which the action is brought and (2) sending a copy of the summons and complaint to the Attorney General of the United States in Washington, D.C. via registered or certified mail. Effective service upon an agency of the United States requires the additional step of (3) delivery of the summons and complaint upon the agency via registered or certified mail. Fed. R. Civ. P. 4(d)(5).

7. Fed. R. Civ. P. 4(j) provides: "if a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice..." Accordingly, absent a showing of good cause, plaintiff had until may 23, 1993 to properly serve the United States Attorney in the method described above, in order to effect proper service upon the United States.

8. The Third Circuit Court of Appeals has held that the 120 day

time limit imposed by Rule 4(j) "is to be strictly applied, and if service of the summons and complaint is not made in time and the plaintiff fails to demonstrate good cause for the delay 'the court must dismiss the action as to the unserved defendant.' "Hilmon Co. v. Hyatt Int'l, 899 F.2d 50, 252 (3d Cir. 1990) (quoting Lovelace v. Acme Markets, Inc., 820 F.2d 81,84 (3d cir. 1987), cert.denied, 484 U.S. 965 (1987) (citations omitted) (emphasis in original). The requirements of Rule 4(j) should not be taken lightly; rather, a plaintiff should "(t)reat the 120 days with the respect reserved for a time bomb." Braxton v. United States, 817 F.2d 238, 241 (3d Cir. 1987).

9. the "good cause" provision of Rule 4(j) protects "diligent plaintiffs who, though making every effort to comply with the dictates of the rule, nonetheless exceed the 120-day limit for service. "Green v. Humphray Elevator and Truck Co., 816 F.2d 877, 880 (3d Cir. 1987). The fact that dismissal for failure to timely serve may result in plaintiff's action being time-barred is not grounds to excuse improper delay. See Lovelace v. Acme markets Inc., 820 F.2d 81, 84 (3d Cir.), cert. denied, 484 U.S. 965 (1987).

10. Plaintiff does not contest that a copy of the summons and complaint were not personally delivered or served on the United States Attorney. Instead, plaintiff argues that the United States Attorney had actual notice of the suit, as evidenced by the certified mailing, opposing counsel's responsive pleading, and her follow-up phone conversation confirming the receipt of the materials.

11. The Third Circuit has consistently stated that "inadvertence of counsel does not constitute good cause."See Branton v. United States, 817 F.2d 238, 242 (3d Cir. 1987); Lovelace v. Acme Markets, Inc., 820 F.2d 81, 84 (3d Cir.), cert. denied, 484 U.S.965 (1987). The defendant's actual knowledge of the complaint and summons do not excuse failure to effect timely service. See Sveiderk v. Brown, No. 86-3918, slip op. at 9 (D.N.J. Mar. 7,

1988) (citing Sieg v. SKarness, 693 F.2d 803, 807 (8th Cir. 1982); see also Prisco v. Frank, 929 F.2d 603 (11th Cir. 1991) (affirming dismissal for failure to properly serve when United States Attorney received summons and complaint by certified mail).

12. In the case of a pro se plaintiff such as Ms. Chang, this court would be inclined to extend all permissible leniency in the application of procedural requirements of litigation with which an unrepresented plaintiff may be unaware. In interpreting the good cause requirement of Rule 4(j), a pro se litigant's good faith attempt at timely compliance should be considered. In the present case, however, the United states Attorney's Office properly made immediate objection to the service by mail when Assistant United States Attorney Blaine wrote to Ms. Chang on April 12, 1993, as mentioned above. AUSA Blaine explained to Ms. Chang the reasons why the United States had not been properly served and how Ms. Chang must remedy the defect by accomplishing personal service upon the United States Attorney as required by Rules 4(d)(4) & (5), above. (See Blaine Declaration at ¶¶ 3 & 4 and attachment thereto.) AUSA Blaine gave this notice to MS. Chang, and even enclosed a copy of Rule 4 in its entirety, well before expiration of the 120-day period. (Id.) In short, plaintiff Chang knew, shortly after April 12th, that she must arrange to make personal service upon the United States Attorney's Office before expiration of the 120 -day period on May 13, 1993. Ms. Chang did not take this advice, and there is no good cause to excuse her failure to do.

13. Therefore, the plaintiff has failed to establish good cause for the failure to effect personal delivery of the complaint and summons on the United States Attorney for the District of New Jersey. Thus, the plaintiff's complaint must be dismissed without prejudice pursuant to Rule 4(j). See Hilmon, 899 F.2d at 252.

14. For the reasons set forth above, defendants' motion to dismiss the plaintiff's complaint for failure to timely serve is granted, and plaintiff's complaint is dismissed without prejudice. In light of our disposition of the failure to timely serve issue, defendants motions for summary judgment and plaintiff's cross-motion for summary judgment shall be dismissed as moot.

WHEREFORE, IT IS this 16th day of November, 1993 hereby

ORDERED that plaintiff's Complaint be, and it hereby is, DISMISSED for failure to comply with Fed.R.Civ.P.4(j).

/s/ Jerome B. Simandle

JEROME B. SIMANDLE
UNITED STATES DISTRICT JUDGE

cc: Ms. Min-Ju Chang, pro se
AUSA Paul Blaine

42 U.S.C.§ 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited: employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the the Postal Rate Commission, in those units of the Government of the district of Columbia having positions in the competitive service ,and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(c) Civil action employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency or unit until such time as final action may be taken by a department, agency, or unit, and employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(e) government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statues or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

Amendments 1991 Subsec. (c) Pub. L. 102-166, § 114(1), increased time within which aggrieved employee or applicant may file civil action from within 30 days of receipt of notice of final action to within 90 days of receipt of such notice.

28 U.S.C. § 2071. Rule-making power generally

(a) The supreme Court and all courts established by Act of Congress from time to time prescribe rules for the conduct of their rules of practice and procedure prescribed under section 2072 of this title.

(b) any rule prescribed by a court, other than the supreme Court, under subsection (a) shall be prescribed only after gibing appropriate public notice and an opportunity for comment. such rule shall take effect upon the date specified by the prescribing court and shall have such effect on pending proceedings as the prescribing court may order.

(c)(1) A rule of a district court prescribed under subsection (a) shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit. (2) Any other rule prescribed by a court other than the supreme Court under subsection (a) shall remain in effect unless modified or abrogated by the Judicial Conference.

(d) Copies of rules prescribed under subsection (a) by a district court shall be furnished to the judicial council, and copies of all rules prescribed by a court other than the Supreme Court under subsection (a) shall be furnished to the Director of the Administrative Office of the United States Courts and made available to the public.

(e) If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment.

(f) No rule may be prescribed by a district court other than under this section.

(June 25, 1948, c.646, 62 Stat.961; May 24, 1949,c. 139, §102,63 Stat. 104; Nov. 19, 1988, Pub.L. 100-702, Title IV, §403(a)(1), 102 Stat. 4650.)

Federal Court Rules

The Revised rules of the Supreme Court of the United States, the Federal Rules of Civil Procedure, the Federal Rules of Evidence, the Federal Rules of Appellate Procedure, the Rules of the courts of Appeals, the Rules of the Court of Claims, and the Rules of the Court of International Trade, together with the judicial constructions and interpretations thereof, are published at the end of this Title for convenient reference.

28 U.S.C.§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

(Added Pub.L. 100-702, Title IV. § 401(a), Nov. 9, 1988, 102 Stat.4648, and amended Pub.L. 101-650, Title III,§ 315, Dec. 1, 1990, 104 Stat. 5115)

Federal Court rules

The federal Rules of Civil Procedure, together with the Notes of the Advisory Committee, Law Review Commentaries, and the judicial constructions of the Rules, are published at the end of this Title for convenient reference.

Fed. R. Civ. P. Rule 60. Relief From Judgment or Order

(a) Clerical Mistakes. clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. during the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; excusable Neglect; Newly discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. a motion under this subdivision (does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment , order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bills of in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987.)